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IN THE

Supreme Court of the United States

October Term 1959

No. 735

NATALE EVOLA and VINCENT GIGANTE,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND JUDICIAL CIRCUIT.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Natale Evola and Vincent Gigante respectfully show to this Honorable Court, the following:

The Determinations in the Courts Below

Petitioners Natale Evola and Vincent Gigante were convicted on April 3, 1959, after trial before Hon. Alexander Bicks and a jury, sitting in the United States District Court for the Southern District of New York, of the crime of conspiracy to violate Sections 173 and 174 of Title 21, United States Code, prohibiting the unlawful importation, sale, distribution, etc. of narcotic drugs.

Numbers in parentheses refer to pages in the record.

On January 12 ,1960, the United States Court of Appeals for the Second Judicial Circuit, in an opinion by Chief Judge Lumbard of said Court, entitled "United States of Ameriea vs. Alfredo Aviles, et al." No. 355, October Term 1958, Docket No. 25682 (not yet officially reported) petitioners' convictions were affirmed by said Court. A copy of said opinion is attached hereto and made a part hereof. (See Appendix.)

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Rule 19 of the Rules of the Supreme Court of the United States and Title 28, United States Code, Section 1254(1), on the ground that the United States Court of Appeals for the Second Judicial Circuit has decided Federal questions of substance which ought to be clarified and made more definite and certain, and has decided questions of substance in a manner not in accordance with applicable decisions of this Court.

Application for bail and for a stay of the mandate of the Circuit Court of Appeals for the Second Circuit, made on January 26, 1960 was denied on February 8, 1960, without opinion.

Application for bail pending determination of this petition for a writ of certiorari was made to Mr. Justice Harlan, Associate Justice of this Court, who on February 18, 1960 denied the relief sought with leave to each petitioner to renew said application if his petition for certiorari is granted by this Court.

The Questions Presented for Review

1. As to Petitioner Natale Evola

(a) Whether or not there was sufficient evidence as matter of law as to petitioner Natale Evola to warrant an inference of his participation in the alleged conspiracy, and whether, based upon the evidence admitted against him, his conviction was in violation of due process of law.

(b) Whether or not the Trial Court committed reversible error by permitting the chief Government witness to suspend his cross-examination at a crucial point by assigning counsel to advise him and by granting him an opportunity to communicate with his wife and daughter before resuming his cross-examination, thus depriving petitioner of due process of law.

2. As to Petitioner Vincent Gigante

(a) Whether or not submission of the case to the jury based upon the chief Government witness' testimony as to petitioner Gigante violated petitioner's rights to due process of law.

Applicable Constitutional Statutory Provisions

(a) Constitution of the United States, Section 1, Fourteenth Amendment:

> "* * * nor shall any person be deprived of life, liberty or property without due process of law."

Statutes Involved

Section 371 of Title 18, U. S. C., provides that:

> "If two or more persons conspire either to commit any offense against the United States, or any agency

thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy * * * " they shall be liable to the penalties stated in the statute.

Section 173 of Title 21, which appellant was charged with conspiring to violate, states, in pertinent part:

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction * * *."

And Section 174 provides that it is unlawful for any person to:

> "fraudulently or knowingly import, or bring any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or to conspire to commit any of such acts in violation of the laws of the United States."

Argument

The indictment charges that between February 1, 1955 and continuously thereafter up to and including the date of the filing of the indictment on July 7, 1959, petitioners Evola and Gigante together with 35 other defendants and various individuals named as co-conspirators but not as defendants, and with divers other persons to the Grand Jury unknown, "unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code."

The indictment further charges that:

"It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, possess, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States, contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

"It was a part of said conspiracy that the said defendants and co-conspirators would unlawfully import, smuggle, and clandestinely introduce large amounts of narcotic drugs into the United States from and through Cuba, Puerto Rico, Mexico, and other countries to the Grand Jury unknown.

"It is further a part of said conspiracy that said defendants and co-conspirators would dilute, mix, and adulterate said illegally imported narcotic drugs prior to their distribution throughout the United States.

"It was further a part of said conspiracy that said defendants and co-conspirators would unlawfully distribute quantities of narcotic drugs, the amounts of which are to the Grand Jury unknown, throughout the United States, to wit: New York City, New York; Chicago, Illinois; Las Vegas, Nevada; Philadelphia, Pennsylvania; Cleveland, Ohio; and other cities and states to the Grand Jury unknown.

"It was further a part of said conspiracy that the defendants and co-conspirators would misrepresent, conceal, hide and cause to be misrepresented, concealed and hidden, the purpose of the acts done in furtherance of the conspiracy."

Out of the 28 overt acts set forth in the indictment, 2 refer to petitioner Evola. They read as follows:

> "14. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July, 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA and VITO GENOVESE went to a bar on 96th Street, in New York City, New York.
>
> "15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA, SALVATORE SANTORA and [redacted]spirator Robert Roe had a conversation in a ho[redacted]n 85th Street, New York City, New York.

In submitting the case to the jury, the trial judge deleted both overt acts from the indictment and instructed the jury that they were not to consider them.

Out of the 28 overt acts set forth in the indictment, only one refers to petitioner Gigante. It reads as follows:

> "18. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August, 1956, in the Southern District of New York, the defendants, VINCENT GIGANTE, JOHN ORMENTO, and VITO GENOVESE, drove on the West Side Highway, New York City, New York."

The indictment was severed as to 20 defendants, leaving 17 who stood trial. One of the 17, Joseph Vento, was acquitted by the trial court. Another of the defendants, Louis Fiano, was acquitted by the jury.

PETITIONER NATALE EVOLA's POINT No. 1

Cantellops' testimony as to petitioner Evola is insufficient as a matter of law to warrant an inference of participation in the conspiracy charged in the indictment.

Petitioner Evola has never before been convicted of any crime (R. 1148a). His conviction in this case turns solely on the uncorroborated and worthless word of Nelson Cantellops, whose rank perjuries and vicious criminality are fully discussed in the briefs submitted by counsel for other petitioners.

An examination of Cantellops' testimony both at the trial and before the grand jury reveals that Cantellops falsely substituted Evola's name in place of Galante and Santora.

On direct examination, Cantellops testified that in August, 1956, he, Ormento and an unidentified "Mexican", whose name he did not know and to whom he referred as "Mexico", had a discussion concerning his making a trip to Mexico to pick up narcotics (R. 296a-297a). Cantellops said that he refused to go, but agreed to meet them on the following day. The next day, he says, he was picked up by Ormento, the Mexican and Mazzie, and that the group was later joined by *Galante* (R. 297a-298a). This group went to an alleged hotel on 85th Street where the Mexican lived with his wife (R. 299a). In the hotel room they again discussed the proposed trip to Mexico, but Cantellops still refused to go (R. 299a-300a). However, he again agreed to meet with the group the next day (R. 300a-301a).

At the alleged meeting on the following day Cantellops eliminated Galante and substituted Evola (R. 301a):

> "Q. Were you introduced to Evola at this time? A. Yes.
>
> "Q. Who introduced you? A. Ormento.
>
> "Q. How were you introduced? A. He said, 'Nelson, this is Evola. Evola, this is Nelson', and they call him Joe.
>
> "Q. Joe what? A. Later on I hear everybody call him Joe Diamond.
>
> "Q. And did you address him as Joe? A. Yes" (R. 301a).

On cross-examination, Cantellops admitted that before the grand jury on March 20, 1958, he had testified as follows (R. 711a-712a):

> "'Q. Where did this transaction take place? A. This time I got the money in the Mexican apartment.
>
> 'Q. On 85th Street? A. Yeah.
>
> 'Q. Or around 85th Street? A. In 85th Street.
>
> 'Q. Who was present? A. Another old man with him. I think his name was *Galente*.
>
> 'Q. *G-a-l-e-n-t-e*. Did they use a nickname in referring to this old man or any other name? A. I don't know, but I think they called him "*Joe*" some place, something like that.
>
> 'Q. Joe? A. I don't remember, but I think it was Joe.
>
> 'Q. Will you describe this old man? A. He has a round face, thin hair, heavy, short nose—how you call a stocky type, a short fellow?
>
> 'Q. He was short and stocky? A. Not my short, not short like me, but short in comparison with the average—
>
> 'Q. Medium height? A. Medium height.

'Q. You say that they called this man Joe—did they ever call this man Carmine, in addition to calling him Joe? A. Carmine?

'Q. Yes. A. No. I know Carmine.

'Q. Did they ever call this man Lillo, L-i-l-l-o? A. No.

'Q. *When they called this man Joe, could they have called him Joe Diamond, and could you be referring to Natale Evola'—spelled by the Assistant United states Attorney—'N-a-t-a-l-e E-v-o-l-a?* A. In order to identify more clearly, through a picture I identify the man better. *It is too long ago, and I can't place him.*'

"Were you asked those questions before the Grand Jury by Assistant United States Attorney Shaw on March 20, 1958, and did you make those answers; yes or no? A. Yes, that was my best recollection." (Emphasis added)

The record further shows that Cantellops' identification of Evola before the grand jury was induced by showing him a picture (R. 722a) *with the name "Natale Evola" written thereon* (R. 722a). All other pictures shown to him had no names on them, except one with the word "Polizar" (R. 724a).

Cantellops also admitted that on March 20, 1958, he testified before the grand jury that at the second meeting in the Mexican's hotel the persons present were "*Santora, Ormento, the Mexican and myself*" (R. 715a) and that at this meeting "*it was Santora* who made the proposition why the trip couldn't be done through Miami" (R. 715a-716a).

At the trial he brought Evola into the meeting at the hotel and testified that "Evola proposed that why don't they do it like I say through Miami" (R. 714a).

In this connection it is important to emphasize that Cantellops identified the hotel as the Del Rio Hotel on 85th Street toward West End Avenue. The owner of the hotel, however, called as a witness for the defense, produced his records and testified that there was no Mexican living at this hotel during the summer of 1956 and that it was then not a transient hotel but "a permanent hotel" (R. 950a-958a).

The only other testimony where Cantellops mentions Evola is his assertion that sometime in the middle of August, 1956, and toward the end of August or early September, 1956, he met Evola. On the former occasion, at an alleged meeting in a park on 81st Street and Columbus Avenue, Evola told Ormento that "they had a new place to make a delivery" in Brooklyn and that he would turn over money later (R. 318a-321a).

On the alleged second meeting with Evola, Cantellops asserted that in late August or early September, 1956, Evola was present with Ormento, Galante, Papadio and others in a house in the Bronx, where "sealing" of territory was discussed by buying up the Spanish policy banks and that Evola and Papadio said that it would take about a month or a month and a half to do it (R. 347a).

This testimony was flatly contradicted by Cantellops himself when he later said that during this period of time he was in Puerto Rico:

> "Q. Now, Mr. Cantellops, do you remember telling this jury about a trip to Puerto Rico? A. Yes.
> "Q. When was that? A. The end of August or the beginning of September, 1956" (R. 725a).

Cantellops' performances under oath demonstrate an amazing facility for mixing fact with fiction and substituting one man for another, depending upon his arbitrary choice. Thus, he testified that Galente was the "Joe" whom he met at the "Mexican's" hotel and that Evola was the "Joe" whom he met; that "it was Santora who made the proposition why the trip couldn't be done through Miami" and that "Evola proposed that why don't they do it like I say through Miami".

Such testimony is no evidence in the eyes of the law:

> "He who under one oath knowingly affirms a proposition, and under another oath knowingly negates the same proposition, is not to be credited in either instance. The one statement neutralizes the other; and in a court of justice his evidence is entitled to no weight unless corroborated."
>
> *Johnston* v. *Sochurek* (104 Ill. App. 350, 352).

> "If the proof of the fact lies wholly with one witness, and he both affirms and denies it, and there is no explanation, it cannot stand otherwise than unproven. For his testimony to prove it is no stronger than his testimony to disprove it, and it would be mere caprice in a jury upon such evidence to decide it either way. * * * If a plaintiff should testify with equal positiveness that defendant stole his horse and that some third person stole his horse, no one would doubt that the case ought not to go to the jury."
>
> *Johnston* v. *Cincinnati N. O. & T. P. Ry Co.*, 240 S. W. 429, 436.

Cantellops' perjury at the trial is further demonstrated by his testimony that the hotel where he allegedly met and conferred with Evola and others was the Del Rio Hotel on

West 85th Street, and that he pointed out the hotel to agents of the United States Attorney's office (R. 609a, 707a, 817a-820a).

This testimony was in direct conflict with the prosecutor's representation, made in the absence of the jury, that Cantellops "pointed out one or two hotels, but was not certain that that was the hotel", that "the witness could make no positive identification of the hotel" and that therefore the Government's bill of particulars merely stated that the hotel was "between West End Avenue and Riverside Drive". (R. 821a-822a).

In these circumstances, counsel for Evola urged that it was incumbent upon the Government to inform the jury that in this respect Cantellops committed perjury at the trial. The prosecutor, however, refused:

> "Mr. Londin: I decline to impale myself on the horns of a dilemma. The witness has so testified and, that is the testimony in this case" (R. 826a).

Such self-contradictory testimony by a perjuror who had not the slightest compunction of lying under oath, does not constitute substantial evidence for submission to a jury. All other testimony in the massive record of over 5,000 pages is barren of any reference to Evola. Cantellops' assertions as to Evola, it is submitted, are insufficient in law to connect Evola with the gigantic conspiracy alleged in the indictment.

PETITIONER NATALE EVOLA's POINT No. 2

The trial court committed reversible error by permitting Cantellops to suspend his cross-examination at a crucial point, by assigning counsel to advise him and by granting him an opportunity to communicate with his wife and daughter before resuming his cross-examination.

During the cross-examination of Cantellops, counsel for petitioners Evola and Gigante sought to show that the witness had received some promise from the Government that he would be released from prison by Christmas 1958, after the conclusion of his testimony and before the expiration of his present sentence, this being the time it was then reasonable to believe that this trial would be ended. In this connection the witness was being questioned as to whether or not he had ever informed his daughter, in a letter which he identified as being in his own writing, that he was going to be released from prison around Christmas. Instead of answering the question the witness interrupted his cross-examination and requested an "investigation" as to how the letter came into the possession of defense counsel. After a recess and after extended argument on this and another matter, the United States Attorney informed the Court that the witness Cantellops refused to testify further unless he saw his daughter and that he expressed concern for his daughter's safety. The Court ruled, over the objection of defense counsel, that the sequestration rule under which the witness was testifying would be relaxed and that the witness would be permitted to visit with his daughter, if she consented. The Court set certain specific conditions under which arrangements were to be made for the witness to visit with his daughter. The Court also denied defense counsel's application to restrict

the conversation between the witness and his daughter to the topic of the daughter's health and safety and to omit any discussion between them as to the letter or the subject matter of this case.

Counsel was subsequently informed that the instructions of the Court as to the arrangements for the witness' visit with his daughter were not followed but that the witness was permitted to speak with his daughter over the telephone.

At the morning session following the witness' refusal to continue his cross-examination, the Court informed counsel the witness desired to speak with the Court; that the Court was not disposed to speak to the witness except in the presence of counsel and that the Court had requested Arnold Fraiman, Esq., of Dewey, Ballantine, Bushby, Palmer, Wood and Fraiman to serve as counsel to the witness if the witness so desired and that said counsel was present in Court.

Thereafter the witness was brought into the courtroom and stated that he requested to speak to the Court because although there was "nothing wrong with the letter" he was "concerned with the method used to obtain the letter" and that he made this "explanation" so that the Court could refer the matter to the proper authorities. The witness then agreed to confer with the Court appointed counsel after the afternoon session that day.

His cross-examination concerning the letter was thereupon resumed.

It should also be pointed out that there was in fact no illegality in the defense's acquisition of the letter which

had been given to the defense counsel by the witness' daughter who gave it to her brother who later testified in behalf of the defense.

It is apparent from the above brief resume of what transpired at this point in the trial that the procedure adopted by the Court constituted error which was extremely prejudicial to all defendants. It is to be noted that at this crucial point in the trial, when this witness was being asked simple questions concerning a letter admittedly written by him which indicated a hope of reward and went to the core of his motives and interest in testifying for the Government and affected the credibility of his entire testimony, nevertheless, the Court permitted this witness to interrupt his cross-examination and impose certain conditions upon the resumption of his cross-examination.

The following objections were properly raised by defense counsel to the Court's action:

1. Defendants' cross-examination of this Government witness on a vital issue with proper questions was unnecessarily interrupted, and defense lost the advantages and effect of having the witness confronted with his own written statement, then and there in open Court, without delay and without imposition of his own or the Court's conditions.

2. Defendants were thus deprived of their constitutional right to "due process" in the cross-examination of this key Government witness.

3. The rule of sequestration as to this witness was unnecessarily and improperly violated.

4. The witness should have been directed to answer proper questions addressed to him on cross-examination without the assignment of counsel because the questions and

the witness' "explanation" in no way involved his constitutional privileges, and he made no request for the appointment of counsel to protect his constitutional rights.

5. The assignment of counsel thus fortified the witness to continue his blatant perjury.

In the case of *In re Black*, 47 F. 2d 542, 543, the Court wrote:

> "Neither at a trial nor before a grand jury is he (a witness) entitled to have the aid of counsel when testifying."
>
> * * * * *
>
> "A witness is not entitled to be furnished with facilities for evading issues or concealing true facts."

To permit a witness to suspend his cross-examination so as to enable him to contrive means of coping with counsel's questions and to supply an attorney to advise him is wrong. See, *In re Groban*, 352 U. S. 330, 333, footnote 5.

A defendant must be afforded effective opportunity to cross-examine the government's witness. A day's suspension of cross-examination in the circumstances revealed in this case was destructive of its potency, giving the witness an opportunity to improvise an explanation and bolster his version of events by a contrived showing of verisimilitude, and hence not qualify as a "reasonable opportunity" for cross-examination (*Reilly* v. *Pinkus*, 338 U. S. 269).

Where a witness during his testimony, raises the question of his constitutional rights and privileges, that becomes a matter solely for the Court to decide (*United States* v. *Costello*, 222 F. 2d 656; *Wollam* v. *United States*, 244 F. 2d 212).

PETITIONER VINCENT GIGANTE's POINT No. 1

Cantellops' testimony as to petitioner Gigante was wholly insufficient as a matter of law to warrant submission of the case to the jury.

Cantellops was the only witness against Gigante, and what he said is so patently insufficient to connect him as a co-conspirator that it is difficult to understand how any court could submit his case to a jury. The only possible explanation of the verdict is that he was swamped by a mass of approximately 5,000 pages of testimony with which he had no relation whatever.

Cantellops' entire testimony at the trial as to Gigante is as follows:

He said on direct examination that sometime in July, 1956, Carmine Polizzano asked him to take a trip to Cleveland, Ohio (R. 288a). On the following day Polizzano told him he would be driven "by somebody up to a certain point" and that from there he was to take a bus to a hotel in Cleveland where he would meet Charlie Brody (R. 288a-290a).

As Cantellops was receiving these instructions, a car allegedly came driving through the street and stopped a few feet away from them. Thereupon, said Cantellops, Polizzano "told me that is the fellow that will drive you; on your way you make acquaintance with him and he will let you know where to get off and what to do next" (R. 290a).

Cantellops identified Gigante as the fellow in the car. He testified that Gigante was introduced to him as "Chin",

and that upon entering the car "we started driving off" (R. 291a).

Gigante, he said, drove him to Lorain, Ohio, about one hour's ride from Cleveland (R. 292a), and described his conversations on the trip as follows (R. 291a-292a):

> "Q. Mr. Cantellops, at the noon recess or just before the noon recess I asked you about the conversations that you had with the defendant Gigante in the car on the way to Cleveland.
>
> Now, will you tell us what he said to you and what you said to him as best you can recall. A. I explained my invention to him and I asked him what was his opinion. Then he asked me if I knew certain people. He mentioned—
>
> * * * * *
>
> A. (Continuing) He asked me if I knew Big John, Joe Beck, a fellow named Tom Meeks, The Right Man, and lots of people. I said I knew only a few of them.
>
> Q. What did you say to him? A. After that I told him that I saw no reason taking chances in dope when this invention of mine could provide a big amount of income, of money.
>
> Q. What did you say to him about the names that were mentioned? A. Well, the one that I knew I said that I knew; of the ones I didn't know, I told him I didn't know.
>
> Q. Whom did you tell him you knew? A. I told him that I knew Big John, Joe Beck, Carmine, and so on—Carmine Polizzano.
>
> Q. And what did you tell him about the other names? A. That I didn't know them, that I never hear about them.
>
> * * * * *

Q. Was there any other conversation that you can recall? A. Yes. He told me that he will put a word with Big John and he will try to make an arrangement for me to be introduced to the Right Man to see if the invention could be worked out."

Cantellops further testified that upon arriving in Lorain, they went to a gas station, and that while the attendant was serving gas, Gigante told him "to go and in the back behind the spare tire where the stuff is, to pick them up and to keep going and take a bus from there to Cleveland" (R. 293a). Thereupon, said Cantellops, "I went to the back of the car, picked the key from the gas cap, opened the trunk and I picked the stuff from behind the spare tire" (R. 293a). He described it as being wrapped "in the shape of a box" ten inches by eight inches, and stated that after taking this box he walked away and took a bus to Cleveland (R. 293a).

Cantellops also testified that in late August or early September of 1956 he had occasion to see Gigante again. He related the following: While driving up the West Side Drive with Ormento, Evola, Papadio and Galante on the way to the meeting on Seymour Avenue the car in which the witness was riding pulled over to an emergency exit on the side of the road and the witness and Ormento entered a second car driven by Gigante which had similarly pulled to the side. When the witness entered this car he was introduced by Ormento to appellant Genovese, to whom he explained his invention. Cantellops added that while in the car, Genovese told him that they were going to a meeting at which territorial control would be discussed and that Cantellops was being depended upon to offer his assistance. He was also told that by helping out he could earn suffi-

cient funds to enable him to proceed to have a sample of his invention made after which they would take care of the rest (R. 337a-340a).

It is from this testimony that the trial court submitted to the jury the question whether Gigante knowingly became a member of the conspiracy charged in the indictment (R. 1099a-1101a).

Cantellops' perjury is revealed by the fact that before the grand jury he testified that he traveled to Cleveland from New York *alone by bus*, making "a big change in Pittsburgh" (R. 629a, 738a). On cross-examination his testimony was (R. 626a-629a):

> "Q. Did you ever swear before a jury or a grand jury, rather, a grand jury, that you took this trip by bus; yes or no? A. Yes, I reached Cleveland by bus.
>
> Q. If you will just listen to me: Did you ever swear before the grand jury that you made this Cleveland trip by Greyhound bus; yes or no? A. Yes.
>
> Q. Tell us the details of what you said to the grand jury about your trip by bus to Cleveland, when you testified about the Cleveland trip by bus—tell us what you told the grand jury, everything you told the grand jury about that trip to Cleveland, and I will tell you the date, when I want you to do that.
>
> Mr. Christy: Objection, your Honor.
>
> The Court: Let us get the facts. Did you go by Greyhound bus?
>
> The Witness: Now, I correct that mistake, and I rectify it—
>
> The Court: Did you go by Greyhound bus?
>
> The Witness: No, by bus from Lorain to Cleve-

land, but I was riding by car from here to Lorain, Ohio.

The Court: Did you ever testify before the Grand Jury that you had gone by Greyhound bus straight from New York through to Cleveland?

The Witness: *Yes, your Honor, and I had a reason to do it and I did it and I am sorry for it.*"

* * * * *

"Q. May I refresh your recollection? Were you asked these questions and did you make these answers before the Grand Jury—

Mr. Christy: What page?

Mr. Edelbaum: Page 193:

Q. —'Q. Where did Carmine take the package from which he gave you? A. From the basement in that plant.

'Q. Did you go into the basement with him? A. No.

'Q. You stayed outside? A. Yes.

'Q. And he came out of the basement with this package? A. Yes.

'Q. Now, how did you travel to Cleveland? A. *By bus; I make a big change in Pittsburgh.*'

'Were you asked those questions and did you make those answers to Assistant District Attorney Shaw on March 20, 1958? A. Well, *the trip is truthful but*—

The Court: Mr. Witness, you heard the questions that were put to you and the answers that you gave. Were those questions put and did you make the answers as read to you by Mr. Edelbaum?

The Witness: Yes." (Emphasis supplied)

If we stretch Cantellops' testimony at the trial to the limit, it could not be deemed sufficient in law to justify an

inference that he knowingly became a member of the conspiracy or with knowledge thereof aided and abetted its purposes. Cantellops' testimony is barren of proof that Gigante knew the purpose for which Cantellops was going to Cleveland. Nor is there sufficient evidence to show that Gigante knew what was in the box, or had any knowledge of the overall conspiracy alleged in the indictment. At best, even if Cantellops' recantation of his grand jury testimony be accepted, it represents nothing than an isolated transaction which as a matter of law fails to make him a member of the conspiracy charged. (*United States* v. *Reina*, 2d Cir., 242 F. 2d 302; *United States* v. *Dellaro*, 2d Cir., 99 F. 2d 781, 783.) As stated by this Court in *United States* v. *Euphemia*, 2d Cir., 261 F. 2d 441, 442:

> "The Government was required to show more than that Euphemia was acquainted with Perna or that the two men were friends. Euphemia's explanations and Rosalie Orso's story may be unworthy of belief, but it is our opinion that the Government failed to produce any testimony linking Euphemia's actions on the night of November 13 to the criminal activities of Mario Perna on that evening. Proof that the defendant knew Perna and rode seventy blocks in the same vehicle with him does not appear to be enough here to prove that the defendant was Perna's 'partner' in the illegal sale of narcotics."

Finally, "There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of the criminal law know well its untrustworthy character." (*People* v. *Shilitano*, 218 N. Y. 161, 170.) In this case, we are not dealing with an ordinary

recantation, but with a wretched perjurer whose word is worthless.

WHEREFORE, petitioners Natale Evola and Vincent Gigante respectfully pray that a writ of certiorari may issue out of and under the seal of this Court directed to the Circuit Court of Appeals for the Second Judicial Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause, and a complete transcript of the record and proceedings had herein, to the end that the conviction of petitioners of the crime of violating Sections 173 and 174 of the United States Code, Title 21, and sentencing petitioner Natale Evola to a term of imprisonment for ten years, and sentencing petitioner Vincent Gigante to a term of imprisonment for seven years, may be reversed and that the petitioners may have such other and further relief as to this Court may seem just and proper.

Dated: New York, N. Y.,
February 20, 1960.

Respectfully submitted,

MAURICE EDELBAUM
Counsel for Petitioners

MAURICE EDELBAUM
FREDERICK S. ABRAMS
On the brief

Certification

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and in my opinion it is well founded and the cause is one in which petition should be granted.

MAURICE EDELBAUM

SUSAN HUPCHER
Notary Public, State of New York
No. 03-7014500
Qualified in Bronx County
Commission Expires March 30, 1960

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—October Term, 1958.

(Argued September 15, 1959 Decided January 12, 1960.)

Docket No. 25682

UNITED STATES OF AMERICA,

Appellee,

—v.—

ALFREDO AVILES, CHARLES BARCELLONA, JEAN CAPECE, CHARLES DI PALERMO, JOSEPH DI PALERMO, NATALE EVOLA, VITO GENOVESE, VINCENT GIGANTE, DANIEL LESSA, NICHOLAS LESSA, ROCCO MAZZIE, CARMINE POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, and SALVATORE SANTORA,

Appellants.

Before:

LUMBARD, *Chief Judge,*
CLARK and MOORE, *Circuit Judges.*

Alfredo Aviles and fourteen other defendants appeal from jury convictions in the Southern District of New York, Alexander Bicks, *J.*, presiding, for conspiracy to violate the Narcotic laws, 21 U. S. C. §§173 and 174, and sentences ranging from five to twenty years imprisonment, alleging

insufficiency of proof of a single conspiracy and various errors in the admission of evidence and the conduct of the trial. Affirmed as to all defendants, except Benjamin Rodriquez whose conviction is reversed.

JEROME J. LONDIN, Assistant United States Attorney, Southern District of New York, New York, N. Y. (S. Hazard Gillespie, Jr., United States Attorney, Herbert B. Greene, Mark F. Hughes, Jr., Robert Price and Robert E. Scher, Assistant United States Attorneys, on the brief) *for appellee.*

SAUL ROTH, New York, N. Y., *for appellant Alfredo Aviles.*

ROY L. REARDON, New York, N. Y., *for appellant Charles Barcellona.*

ALBERT J. KRIEGER, New York, N. Y. (Theodore Krieger, on the brief) *for appellants Jean Capece, Joseph Di Palermo and Benjamin Rodriquez.*

ROBERT R. KAUFMAN, New York, N. Y. (Rudolph Stand, on the brief) *for appellant Charles Di Palermo.*

MAURICE EDELBAUM, New York, N. Y., *for appellants Natale Evola and Vincent Gigante.*

SOLOMON A. KLEIN, New York, N. Y. (Wilfred H. Davis, on the brief) *for appellant Vito Genovese.*

ABRAHAM H. BRODSKY, New York, N. Y., *for appellants Daniel Lessa and Nicholas Lessa.*

HENRY K. CHAPMAN, New York, N. Y., *for appellant Rocco Mazzie.*

DAVID SCHWARTZ, New York, N. Y., *for appellant Carmine A. Polizzano.*

ALLEN S. STIM, New York, N. Y., *for appellant Ralph Polizzano.*

HERBERT S. SEGAL, New York, N. Y. (Osmond K. Fraenkel, on the brief) *for appellant Salvatore Santora.*

LUMBARD, *Chief Judge*:

Alfredo Aviles and fourteen co-defendants appeal their convictions for conspiracy to violate the narcotic laws, 21 U. S. C. Sections 173, 174 and sentences of imprisonment ranging from 5 to 20 years[1] after a three months' jury trial in the Southern District of New York. The indictment named a total of 37 defendants and 14 other co-conspirators, but only 17 defendants stood trial on the charge of conspiracy to import and smuggle narcotic drugs into the United States, to receive, conceal, possess, buy and sell

[1] Charles Barcellona and Jean Capece received five year sentences; Vincent Gigante and Ralph Polizzano received seven years; Carmine Polizzano—eight years; Alfredo Aviles, Natale Evola and Benjamin Rodriquez—ten years; Charles Di Palermo, Nicholas Lessa and Rocco Mazzie—twelve years; Daniel Lessa—fourteen years; Joseph Di Palermo and Vito Genovese—fifteen years; and Salvatore Santora—twenty years. In addition, fines of $20,000 each were levied on Joseph Di Palermo, Natale Evola and Vito Genovese.

the drugs; to dilute, mix and adulterate the drugs prior to their distribution; and to distribute the drugs. Judge Bicks granted the motion of defendant Vento for judgment of acquittal at the end of the case, and the jury acquitted defendant Fiano.

A summary of the evidence shows that there was ample support for the jury's finding of one overall conspiracy to import, distribute, purchase and sell narcotics in violation of law.

The testimony of the principal government witness, Nelson Silva Cantellops, shows that he first joined the conspiracy in March, 1955 and continued serving it in various capacities until July 1, 1957 when he was arrested. His testimony and extensive cross-examination consumed nineteen days of the trial. The government also called defendants Peter Contes, Joseph Basile, and Salvatore Marino who testified that they participated in the sale and distribution of drugs with various appellants, defendants and co-conspirators. The following chronological summary of the evidence of the conspiracy is based on the testimony of Cantellops unless otherwise stated.

In March, 1955 Cantellops attended a meeting at Al's Luncheonette at 34 East 4th Street, New York, with Charles Barcellona, Ralph Polizzano, Carmine Polizzano, Joseph Di Palermo and Anthony Colonna. Cantellops agreed to transport narcotics to Las Vegas for $1000. At the airport bus, while Barcellona was talking to Cantellops, an unidentified man handed Cantellops a package which he took to Las Vegas. In Las Vegas Carmine Polizzano met him and

introduced him to the defendant Fiano to whom he gave the package later that evening. For this delivery of narcotics Cantellops was paid $1000 by Barcellona.

In June, 1955 Cantellops made a trip to Florida to pick up a shipment of narcotics. Carmine Polizzano gave him a bus ticket and money and he went to Miami where he met Carmine Polizzano and drove to Tampa. When the rendezvous in Tampa was unsuccessful, Cantellops and Carmine Polizzano drove to Key West where outside the La Concha Hotel an unidentified man took a suitcase out of his pushcart and placed it in the back seat of the automobile in which Cantellops was waiting. After driving to Miami Cantellops took the train and delivered the narcotics to Ralph Polizzano at the "plant" at 36 East 4th Street, next to Al's Luncheonette, as Carmine Polizzano watched from across the street. For this trip Joseph Di Palermo and Carmine Polizzano paid Cantellops $600 and later he also received an ounce of heroin as a tip.

Cantellops' third trip in August, 1955 took him to Chicago. Carmine Polizzano instructed him about the trip and gave him a package of narcotics from the trunk of a car parked in front of Al's Luncheonette. Cantellops took a bus to Chicago and the day after his arrival met Carmine Polizzano at a bar on Division Street where he was introduced to a man who picked up the narcotics in the booth where Cantellops had placed them. Cantellops and Carmine Polizzano then drove back to New York and, at Joseph Di Palermo's direction, Carmine Polizzano paid Cantellops. Following the Chicago trip, in August and September, 1955, Cantellops distributed narcotics for Ralph Polizzano.

In October, 1955 Carmine Polizzano asked Cantellops to pick up narcotics in Miami. He told Cantellops that if narcotics were not available in Miami he might have to go to Havana to see certain people. Cantellops went to Miami and at the La Concha Hotel met Charles Di Palermo who introduced him to a man named "Cuba." The three men then drove to the La Concha Hotel in Key West and the next day, upon directions from "Cuba," they picked up a suitcase of narcotics in "Cuba's" hotel room and brought the narcotics to New York by train. Back in New York Cantellops delivered the narcotics to Ralph Polizzano at the basement entrance of Al's Luncheonette upon directions from Carmine Polizzano. For this trip Cantellops was paid $250 by Joseph Di Palermo and $350 by Carmine Polizzano, who also arranged for his assistant, John Russo, to give Cantellops an ounce of heroin as a tip.

In October, 1955, upon Carmine Polizzano's directions, Cantellops explored the policy banks in the Eldridge Street area on Manhattan's lower East Side to find out whether these banks might be used as a front for narcotics distributing plants. After Cantellops had explored the policy banks, Carmine Polizzano invited him to a meeting at Ralph Polizzano's apartment on East 4th Street. This meeting was attended by Ralph and Carmine Polizzano, Joseph Di Palermo, John Russo, John Ormento and Benjamin Levine. The group discussed taking over and operating policy banks as a cover for the distribution of narcotics. Cantellops reported that it would cost between $100,000 and $150,000 to purchase the banks in the Eldridge Street area. The group reached no final decision as it was stated that

the matters would have to be discussed with "The Right Man," who, as Cantellops' testimony later developed, turned out to be appellant Vito Genovese. The meeting also discussed the possibility of importing narcotics through Puerto Rico because of turmoil in Cuba and recent misfortunes respecting two shipments by boat. Cantellops suggested the use of the Island of Vieques, off Puerto Rico, as a distributing point.

During the early part of 1956, at the request of Joseph Di Palermo and Carmine Polizzano, Rosario Colletti delivered narcotics to Cantellops who in turn delivered them to John Gonzalez, alias Guayamita, at Gonzalez's apartment at 793 Ninth Avenue, where they were diluted for resale. In June 1956 Cantellops took over Gonzalez' operations and Joseph Di Palermo and the two Polizzanos arranged for Ralph Polizzano to supply Cantellops with the narcotics necessary to expand this business in the Spanish speaking market. Cantellops called Ralph Polizzano when he needed drugs and he picked them up from Russo at Al's Luncheonette or nearby places. While picking up narcotics at the East 4th Street plant Cantellops saw Ralph Polizzano and Charles Di Palermo diluting narcotics. On two occasions during 1956 when Cantellops was in the East 4th Street neighborhood, he saw Vito Genovese talking to Carmine Polizzano and on one of these occasions when Cantellops approached, he was told by Carmine Polizzano "never to interfere when he was talking to 'The Right Man.'" In the summer of 1956 Cantellops, at Ralph Polizzano's request, made other local deliveries of narcotics.

In July, 1956, Cantellops made his fifth out-of-town trip, this time to Cleveland at the behest of Ormento and Carmine Polizzano. Carmine Polizzano introduced Cantellops to appellant Vincent Gigante who drove Cantellops to Lorain, Ohio. At Lorain, Cantellops took the narcotics from behind the spare tire in the automobile trunk and then took them by bus to Cleveland. In Cleveland he met Charles Di Palermo and he delivered the narcotics to an unidentified woman in a taxicab. After Cantellops returned to New York Carmine Polizzano arranged for him to meet Ormento and in Mazzie's presence Ormento paid Cantellops for the trip.

In August, 1956, a sale by Colletti to a narcotic agent resulted in the arrest of Colletti and Russo and the latter was replaced by the defendant Salvatore Marino who thereafter handled narcotics deliveries for the Polizzanos, at the Squeeze-Inn Bar, the plant at 36 East 4th Street and Al's Luncheonette at 34 East 4th Street. Thereafter Marino made frequent deliveries of drugs to Cantellops.

In August, 1956, Cantellops made his third trip to Miami to pick up narcotics. Before the Miami trip there were discussions and meetings at which Ormento offered Cantellops $1,500 to pick up narcotics in Mexico. After Cantellops refused to do this, meetings were held with a man called "Mexican," Mazzie and Carmine Galante regarding the details of a trip to pick up drugs. Cantellops still refused to go to Mexico.

The following evening Cantellops went with Ormento, Mazzie, "Mexican" and the appellant Natale Evola to a

restaurant on East 86th Street. Here Ormento spoke to Genovese and reported back to Cantellops that "The Right Man" wanted to take a look at Cantellops to see if he was all right.

After this Cantellops went to "Mexican's" hotel room somewhere on West 85th Street and discussed the trip to Mexico with the appellant Salvatore Santora, Evola, Mazzie, Ormento and "Mexican." Cantellops persisted in his refusal to go to Mexico but suggested that he go to Miami instead. As the change in plan involved a delay, Ormento gave Cantellops money to entertain "Mexican" in New York City, which Cantellops did for the next three days. After this Cantellops drove with "Mexican" to Miami. The day after their arrival "Mexican" drove Cantellops to Pompano Beach, secured a suitcase in a motel, and gave it to Cantellops. Cantellops then returned to New York by train and later gave the bag to an unidentified man. For this trip Ormento and Mazzie later paid him $950. After this Cantellops made two deliveries of narcotics to Philadelphia. On the first occasion Cantellops delivered three or four pounds of narcotics to a lame man, with Mazzie watching the delivery from a distance. For this Ormento paid Cantellops $350 in the presence of Santora and Mazzie and told Cantellops that Santora would have another trip for him.

A few days later Carmine Polizzano arranged for Cantellops to meet with Ormento, Santora and Mazzie at which time Ormento asked him to deliver narcotics to Philadelphia for Santora. Cantellops was driven to Philadelphia and delivered the narcotics according to instructions. For the

second Philadelphia trip Santora gave money to Ormento who gave it to Cantellops in the presence of Mazzie and Evola. In addition, Cantellops testified to making a Brooklyn delivery for the same group, for which he was paid by Ormento.

In August, 1956, defendant Contes ordered a large quantity of heroin from Nicholas Lessa and Cantellops delivered this to Contes at the request of Mazzie who paid Cantellops for the delivery. The testimony of Peter Contes tended to confirm these transactions.

A few days later Ormento and Mazzie twice sent narcotics to Daniel and Nicholas Lessa, using Cantellops as the messenger. Mazzie supervised the second delivery and Ormento paid Cantellops for both deliveries.

At the end of August, or early September 1956, Cantellops attended a meeting at Mazzie's home at 2332 Seymour Avenue in the Bronx where plans were made for extending the distribution of narcotics. Earlier in the evening Cantellops drove to a German restaurant on East 86th Street with Evola, Ormento, Galante and Andimo Pappadio. After Ormento made a telephone call, they all drove to the West Side Highway and met another car. Cantellops and Ormento entered the other card which was driven by appellant Gigante. Ormento introduced Cantellops to Genovese, who was sitting in the back seat, saying to Genovese "This man is doing a good job for us. He is helping us and doing a good job for us." Ormento told Cantellops "This is the Right Man." Genovese said to Cantellops that they "were going to a meeting where territorial control was to be

discussed," that the people at the meeting were counting on Cantellops to help them and that Cantellops could earn some money by doing so. The two automobiles drove to Mazzie's home and everyone entered except Genovese and Gigante who stayed outside. Evola, Mazzie, Ormento, Pappadio, Galante and Cantellops discussed the distribution of narcotics in the Spanish market in the East Bronx by use of policy banks and sealing off the area to eliminate competing narcotics peddlers and policy banks so that they could control the narcotics traffic in this area. Evola and Pappadio thought that the plan would take a month or a month and a half to complete and the others agreed. After twenty or thirty minutes Genovese came in. He wanted to know "what was the decision in the plan, what they had in mind." When he was told about the discussion which had taken place, Genovese said that he needed this information because he wanted to know when to send his men into the area. Later, in the presence of Evola, Ormento, Pappadio and Galante, Cantellops was advised that he would be the contact man for the distribution of narcotics in this area. Cantellops later delivered narcotics in this area at Ormento's request.

In September, 1956, Ormento and Galante sent Cantellops to Puerto Rico for narcotics. In Puerto Rico he contacted someone named Laurensano who instructed him where to find one Perez on the island of Vieques. When Cantellops met Perez he was given a double marine canvas bag containing narcotics. Cantellops advised Laurensano that he was sending the drugs to three fictitious persons in care of General Delivery, Post Office, New York, and Lau-

rensano advised that he would inform Ormento. Cantellops then mailed the heroin in three packages from three separate post offices. When Cantellops returned to New York Carmine Polizzano arranged to have him meet Ormento who said the drugs had arrived and Ormento paid him for the trip.

After this Cantellops met with Joseph Di Palermo, "Cuba" and a man named Montanez, and Montanez advised that there would be no more shipments from Cuba to Miami and Key West for the rest of the year because of unsettled conditions in Cuba. This meeting took place just a few days before Cantellops was arrested in September, 1956, and he remained in prison until February, 1957.

According to the testimony of three customs inspectors, Joseph Di Palermo, Jean Capece and Salvatore Benanti visited Cuba for two days in November, 1956, and returned to New York on November 20. Jean Capece was searched by a customs inspectress who found $9,000 in new one hundred dollar bills hidden in an undergarment. Jean Capece gave three different stories regarding this money.

When Cantellops left prison in February, 1957, he resumed his narcotics dealings with the Polizzanos, the Di Palermos and Ormento. The appellant Alfredo Aviles became a customer and Cantellops and Marino delivered narcotics to him, Cantellops making his deliveries about once or twice a week from the East 4th Street plant. Aviles paid Cantellops who turned the money over to Ralph Polizzano or Marino and received $100 for each delivery. On one occasion, when Joseph Di Palermo was present, Can-

tellops saw Ralph Polizzano hand to Jean Capece the proceeds of one of these sales to Aviles. Later Aviles bought directly from Ralph Polizzano and Cantellops received commissions on the sales. Aviles in turn resold the drugs which he had purchased from Cantellops and Ralp Polizzano. Marino testified for the government and generally confirmed Cantellops' story about the deliveries and the dealings with Aviles.

Cantellops' fourth and last trip to Miami took place in April, 1957. Joseph Di Palermo and Carmine Polizzano instructed Cantellops to meet Charles Di Palermo in Miami. Carmine Polizzano provided Cantellops with a bus ticket and money and in Miami he met Charles Di Palermo and "Cuba" at the La Concha Hotel. The trio then drove to the La Concha Hotel in Key West. In Key West an unidentified man put luggage in the rear seat of their car and Cantellops and Cuba took this back to Miami in the bus. Here they met Charles Di Palermo and, after rearranging the luggage, Cantellops took the drugs back to New York on the train and delivered them to Carmine Polizzano at the plant on East 4th Street. Later Joseph Di Palermo and Carmine Polizzano paid him about $600 for the trip and he later was given a tip of an ounce of heroin by Marino on Carmine Polizzano's instructions.

At a meeting in May, 1957, in Ralph Polizzano's apartment, there was further talk about sealing up the Eldridge Street territory. Present were Ralph Polizzano, Joseph Di Palermo, Ormento, Cantellops and some friend of Bennie Levine. Cantellops was ordered to start buying up the Spanish policy banks and he attempted to arrange meet-

ings between the owners of these banks and the Polizzanos. Meanwhile Cantellops continued to deliver narcotics for the Polizzanos from the East 4th Street plant until July 1, 1957 when he was arrested.

As we have pointed out, the government called numerous witnesses to corroborate directly and circumstantially the testimony of Cantellops. The three principal supporting accomplice witnesses were Marino, Contes and Joseph Basile, the latter being the same Joseph Basile who was a government witness in *United States* v. *Stromberg*, 268 F. 2d 256, 262 (2 Cir. 1959). Marino testified to a delivery of drugs for Ralph Polizzano on July 5, 1957, and a few hours later the police seized the plant at 36 East 4th Street and found quantities of cocaine and heroin and materials used to dilute, package and distribute these drugs. Marino confirmed Cantellops testimony about the plant at 36 East 4th Street and Al's Luncheonette as centers from which narcotics were distributed by various means. He testified that he delivered narcotics for Ralph Polizzano from the fall of 1956 until his arrest on July 5, 1957.

Peter Contes testified to narcotics transactions involving Daniel Lessa, Nicholas Lessa, Rocco Mazzie and John Ormento. Contes purchased heroin from Daniel Lessa some time later in 1955 or early in 1956 and paid him $900 in the presence of Mazzie and Ormento, after which Nicholas Lessa delivered the narcotics to him. After this Contes made further purchases from Nicholas Lessa in varying amounts up to $2,600. One of Contes' customers was his cousin, Charles Pappalardo, and several days after selling him heroin in April, 1956, both Pappalardo and Contes were

arrested by federal agents who searched Contes' apartment at 318 West 49th Street and found heroin and paraphernalia for diluting and packaging narcotics.

Joseph Basile testified to narcotics dealings which began in August 1955 with the appellant Joseph Di Palermo whom he knew as "Joe Beck." Joseph Di Palermo offered to sell heroin for $8,000 a kilo and cocaine for $400 an ounce. Basile was arrested in November 1955 but jumped bail and went to Europe. When he came back in January of 1956, he ordered half a kilo of heroin and cocaine from Joseph Di Palermo for which he paid $2,000 upon delivery to him by Johnny DePietro, also known as "Johnny The Bug" and the balance of $1,500 at a later date. Basile disposed of the narcotics to his customers. Basile ordered more heroin a few days later at which time Joseph Di Palermo told him that the "goods" came from "Big John" Ormento whom Basile knew. Basile paid Joseph Di Palermo $3,500 in advance for the narcotics which were delivered to him later by Benanti. On another occasion Basile met Joseph Di Palermo and Jean Capece by telephoning Jean Capece at a number which Joseph Di Palermo had given him. Basile ordered half a kilo of narcotics for which he paid $3,500. The narcotics were delivered to Basile in an automobile by "Johnny The Bug" in the presence of Jean Capece and Joseph Di Palermo. Basile took the narcotics to Schenectady and sold it to his customers. He stayed in Schenectady until his arrest on November 10, 1956, but meanwhile he purchased narcotics about once a month from Joseph Di Palermo by telephoning Jean Capece and giving her a message for Joseph Di Palermo or arranging to talk with

him. On one occasion when Basile purchased heroin from Joseph Di Palermo, the package was delivered to him by Charles Di Palermo whom he knew as "Charlie Brody." Basile took the half kilo of heroin to Schenectady and sold it to his customers. On some occasions Joseph Di Palermo delivered narcotics to Basile in New Jersey at the Garden State Diner near the exit of the Garden State Parkway on Route 17.

None of the appellants took the stand before the jury and they called no co-defendant or alleged co-conspirator to rebut directly the strong case of the government.[2]

As is shown by the above summary of the principal testimony in the trial record of over 6700 pages, there was abundant evidence that all of the appellants, except Rodriquez, were part of one conspiracy to import, sell and deliver narcotics. The principal conspirators according to the proof were Vito Genovese, John Ormento, Joseph Di Palermo, Natale Evola, Rocco Mazzie, Carmine Polizzano and Salvatore Santora, among others. Their sources of supply were from such people as James Laurensano, "Montanez," "Cuba" and "Mexican," in Cuba, Mexico and Puerto Rico. According to Cantellops' testimony, he himself went to Puerto Rico and mailed narcotics from there. Of course many of the principal actors not only took part in the importation and transportation of the narcotics,

[2] Only five of the appellants called any witnesses, namely Carmine Polizzano, Mazzie, Gigante, Evola and Rodriquez. These witnesses testified principally regarding Carmine Polizzano's employment, Mazzie's home at Seymour Avenue in the Bronx, Cantellops and his visits to his family, and the Philadelphia neighborhood where Cantellops testified to making a delivery of drugs.

but they had to do with the distribution and delivery of them through others of the appellants such as Jean Capece, Charles Di Palermo, Ralph Polizzano, Vincent Gigante and assistants such as Nelson Cantellops, Salvatore Benanti, John Russo and Salvatore Marino who delivered to Joseph Basile, Peter Contes and William Rovira. The appellant Ralph Polizzano was concerned actively with many of the deliveries and pickups and he seems to have been more or less in charge of the plant and the activities centering around 36 East 4th Street and Al's Luncheonette. Others of the appellants such as Rocco Mazzie and the Lessa brothers, Daniel and Nicholas, had to do with distributing the narcotics to various minor outlets, such as the witness Peter Contes. Others in the group of minor distributors were the appellants Charles Barcellona and Alfredo Aviles.

While the proof is most abundant against those who were active in handling and distributing the narcotics to and from the East 4th Street plant, such as the Polizzano brothers and the Di Palermo brothers, the proof is also sufficient against those who were concerned with the planning and the strategy of the conspiracy and the expansion of its business such as Vito Genovese and Natale Evola.

Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy. We find upon all the evidence that there is ample proof of Genovese's participation in the

conspiracy as one of its principal directing heads. That Genovese was called "The Right Man" by those actively dealing with the distribution of the narcotics and that he acknowledged the name is not without significance in view of his interest and participation in furtherance of the conspiracy.

From all that we have thus far said it follows that there was abundant evidence to implicate appellants Vito Genovese, Joseph Di Palermo, Charles Di Palermo, Carmine Polizzano, Ralph Polizzano, Rocco Mazzie, Natale Evola and Jean Capece. The appellants Daniel and Nicholas Lessa, Charles Barcellona and Alfredo Aviles all purchased narcotics for resale from one or more of the central conspirators on numerous occasions. This was enough to make them participants in the conspiracy as it is clear that they knew the nature of the operation. Whether they knew its full extent and all of its activities and actors is immaterial. This leaves for further consideration the sufficiency of the evidence regarding the appellants Santora, Gigante and Rodriquez.

Ralph Santora was sufficiently implicated in the conspiracy by his attendance at several meetings as well as by his use of Cantellops to deliver narcotics to Philadelphia on two occasions, as mentioned above. It was not error for the court to deny the motion of Santora's counsel to strike out Cantellops' testimony about a meeting early in August 1956 in the "Mexican's" hotel room which was attended by Santora, Ormento, Evola, Mazzie, "Mexican" and Cantellops where they discussed a trip to Mexico by Cantellops to bring in narcotics. The trial judge ex-

cluded overt act 15 of the indictment[3] from the jury's consideration, apparently because the proof was at variance as to the location of "Mexican's" hotel. Of course this did not require exclusion of the overt act and we do not understand on what theory the overt act was excluded, but in any event, the exclusion of overt act 15 did not render irrelevant and inadmissible the evidence relating to this meeting since the evidence was relevant to the conspiracy charge.

The court did submit to the jury 17 of the 28 overt acts alleged in the indictment. As there was ample evidence to warrant the jury in finding that one or more of these 17 overt acts was committed in pursuance of the conspiracy nothing turns on any failure of proof regarding overt act 15.

As to Vincent Gigante, we have already referred to his trip to Lorain, Ohio with Cantellops and narcotics for delivery in Cleveland. During the trip Gigante named a number of the alleged conspirators and asked whether Cantellops was acquainted with them. Cantellops complained to Gigante about the risks he was taking in dealing in narcotics. Upon arrival in Lorain, Gigante told Cantellops to get the "stuff" from behind the spare tire and take a bus into Cleveland. The only other evidence relating to Gigante placed him as the driver of the car in which

[3] "15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA, SALVATORE SANTORA and co-conspirator Robert Roe had a conversation in a hotel on 85th Street, New York City, New York."

Genovese, Ormento, and Cantellops traveled to the meeting mentioned above at which territorial control was discussed. Gigante apparently took no part in the conversation during this drive and he did not enter the house where the meeting was held. Gigante's participation in this second incident appears to be only as a chauffeur. But his trip to Lorain with Cantellops and his knowledge that narcotics were secreted in the trunk are clear evidence of his participation in the conspiracy. His statements during the trip to Lorain would seem to constitute sufficient evidence of his knowledge of the scope of the conspiracy and of the fact that his activity was in furtherance of a larger venture.

As to the defendant Benjamin Rodriquez, we are of the opinion that there is insufficient evidence of his knowing participation in the conspiracy to have warranted submitting the case against him to the jury. Rodriquez strenuously urges that as to him the record contains evidence only of a single isolated purchase of narcotics from Cantellops, and that that evidence, without any additional showing that he knew of the conspiracy of which Cantellops was a member or intended to join in it, is inadequate to convict him. We agree with this contention.

On direct examination, Cantellops testified that in the middle of September, 1955 he delivered narcotics to Rodriquez near the Progresso Bar in the Bronx. Rodriquez pointed out the person to whom Cantellops was to make the delivery and when they walked past each other he delivered the narcotics. When Cantellops gave testimony again about Rodriquez four days later, he testified about

a delivery of drugs to Rodriquez's runner which he places as occurring in the spring of 1956. The only other evidence against Rodriquez was the testimony of a Treasury Agent that, when Rodriquez was arrested in his home on June 4, 1958, he found three cans of milk sugar and upon analysis one of these cans contained some quinine.

Upon cross examination Cantellops affirmed testimony given by him before the grand jury to the effect that he first delivered narcotics to Rodriquez in the spring of 1956. Cantellops' statement on this point was definite and thus it seems to repudiate his prior direct testimony regarding a September, 1955 delivery. Moreover, his testimony contained no clear statement that there was more than a single delivery to Rodriquez, and no suggestion of any conversation with Rodriquez or other manifestation to him by Cantellops which might have given Rodriquez knowledge as to how Cantellops obtained the narcotics.

A single act may be the foundation for drawing the actor within the ambit of a conspiracy. See, e.g., *United States* v. *Carminati*, 247 F. 2d 640 (2 Cir.), cert. denied 355 U. S. 883 (1957). But, since conviction of conspiracy requires an intent to participate in the unlawful enterprise, the single act must be such that one may reasonably infer from it such an intent. Thus, when two men join together to commit a single robbery, one may infer from their common participation in the robbery that they have conspired to commit the robbery. However, in a multiparty conspiracy of the sort revealed in the present case, with actors performing many different tasks in many

places, the inference does not necessarily follow from one contact with one member of the conspiracy.

Rodriquez was not a regular customer of Cantellops, so far as appears from the evidence. We may assume that Rodriquez knew that the narcotics were illegally imported, but there is insufficient basis in the evidence for assuming that he knew that Cantellops was an agent for an existing conspiracy. So far as appears, Rodriquez had no knowledge whatever as to how Cantellops came into possession of the drugs.

The single purchase alone was not enough to prove that Rodriquez was a participant in the conspiracy. It was necessary to the government's case to submit evidence that Rodriquez knew of the conspiracy and associated himself with it. *United States* v. *Reina*, 242 F. 2d 302 (2d Cir.), cert. denied, 354 U. S. 913 (1957); *United States* v. *Koch*, 113 F. 2d 982 (2d Cir. 1940); *United States* v. *Peoni*, 100 F. 2d 401 (2d Cir. 1938). From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it, but there was no such evidence of knowledge here. Nor was there evidence of a continuous course of dealing between Rodriquez and Cantellops, which might warrant the inference that Rodriquez had some knowledge of the character of the source from which his narcotics came.

We therefore reverse the conviction of Rodriquez and direct the dismissal of the indictment against him.

We now proceed to the consideration of the appellants' numerous claims of error regarding the admission of evi-

dence and the conduct of the trial and rulings of the trial judge.

Cantellops' Prior Perjury and Its Effect on His Trial Testimony

Most of the appellants lay great stress on the character of the witness Cantellops and his admitted perjury before the Grand Jury. They argue that his testimony should have been stricken, that no defendant may be convicted on Cantellops' uncorroborated testimony, and that the indictment should have been dismissed. We do not agree. It was for the jury to judge the witness Cantellops on the basis of all that was brought out about his character, his previous activities, his statements to the government, his testimony before the Grand Jury and before the petit jury.

The jury was fully advised of how Cantellops told his story to government agents and the United States Attorney, of his several appearances before the Grand Jury and the changes and modifications in his testimony there. Cantellops testified for five days on direct examination and for fourteen days on cross-examination. The report of his testimony covers about 2,000 pages of the stenographic minutes. The government made available to defense counsel Cantellops' Grand Jury testimony of 312 pages, two question and answer statements, dated October 10, 1957 and January 16, 1958, records showing Cantellops' visits to the United States Court House, the Veterans Administration's medical records regarding Cantellops, and

Rikers Island medical records when the witness was there incarcerated in 1950 and 1953.

The fact that a witness testified untruthfully at a prior time does not require a finding that he is testifying perjuriously at trial. *United States* v. *Margolis*, 138 F. 2d 1002, 1004 (3 Cir. 1943). It is for the jury to say whether his testimony at trial is truthful, in whole or in part, in the light of the witness' demeanor, his explanations and all the evidence in the case. *United States* v. *Reina*, 242 F. 2d 302, 307 (2 Cir.), *cert. denied* 354 U. S. 913 (1957); *United States* v. *Lennon*, 246 F. 2d 24, 28 (2 Cir.), *cert. denied* 355 U. S. 836 (1957).

Nor is there any merit in the contention that Cantellops' admissions that some of his testimony before the grand jury was untruthful vitiated the indictment. The Supreme Court has held that an indictment is not subject to challenge by reason of the incompetence of evidence presented to the Grand Jury. "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." See *Costello* v. *United States*, 350 U. S. 359, 363 (1956).

The further claim is made that the convictions should be reversed because it now appears that Cantellops testified falsely at the trial that no promises had been made to him in return for his testimony. In this connection, affidavits have been filed on this appeal pointing out that on July 1, 1959, three months after the conviction in this case, the Governor of New York commuted Cantellops'

sentence for possession of narcotics. This commutation was granted at the request of the United States Attorney because of Cantellops' assistance to the government in narcotics prosecutions. It does not follow from the action of the United States Attorney and the action of the Governor that any promise was made to the witness. It is a well understood practice for the prosecutor and the chief executive concerned to give appropriate consideration to witnesses who have assisted the government. The witnesses concerned are aware that this is so; the jurors and the general public are also aware of this practice. The purpose of the government is to encourage witnesses to tell what they know; that may be accomplished without prior promise in a particular case. Consequently we do not conclude from the fact of the Governor's commutation that Cantellops was testifying falsely when he disclaimed any promise. Surely it could have been no surprise to anyone that the witness was later shown some consideration; the jury knew that Cantellops hoped for such a result and that the jury gave this due weight can hardly be doubted in the light of the cross-examination on this subject and the arguments made by defense counsel in their summations.

The Interruption of Cantellops' Cross-Examination

The appellants complain that the trial judge erroneously interfered with their cross-examination of Cantellops because the judge permitted the witness to speak to his young daughter at the end of one day and to speak to court-assigned counsel during recess on the following day. These

rulings were well within the proper discretion of the trial judge. There was no showing that these talks had to do with the substance of the witness' testimony and the argument that they unduly interfered with the right to cross-examine, or were in any way prejudicial, has no substance whatever.

On February 10, in the midst of a four weeks cross-examination which began January 30, Cantellops was shown a letter he had written his daughter in which he said he "intended" to be released from prison around Christmas 1958. Later that day the court was informed that Cantellops, fearing for his daughter's safety, wished to see her. Cantellops thereafter talked to his daughter on the telephone although he did not see her. Certainly, under these circumstances and in light of the exceptional length of cross-examination, it was well within the trial court's discretion to release Cantellops from sequestration to speak with his daughter. See *Kaufman* v. *United States*, 163 F. 2d 404, 408 (6 Cir. 1947).

The next day, following assertion by Cantellops that h was worried about his constitutional rights, the judge assigned Arnold Fraiman, Esq. as counsel and Cantellops conferred with him during recess the following day and advised him to answer certain questions which had been asked him. This course of procedure was entirely proper. No delay was involved, and the witness in fact answered all the questions asked him. The complaint of undue interference with cross-examination is frivolous. Indeed the court was exceedingly generous in the latitude it gave counsel in cross-examining Cantellops, even to the point of

permitting considerable repetition and minute inquiry into many matters of doubtful relevance.

The Testimony of Ralph Polizzano's Admissions

Ralph Polizzano complains that the court should have granted him a mistrial because of the introduction of the testimony of James H. Gibbon, of the New York City Police Narcotics Squad, regarding admissions made by Polizzano to Gibbon. After hearing evidence, not in the jury's presence, the court rejected the claim that the admissions had been coerced.

Gibbon testified that after he arrested Ralph Polizzano on July 6, 1957, he went with Polizzano to his apartment #2 on the ground floor of 36 East 4th Street and that the latter told him the "junk" was on top of the cabinet in a black zipper case, and that the cutting apparatus and scales were in another room.

Salvatore Marino then testified to making a delivery of narcotics from the apartment at 36 East 4th Street for Ralph Polizzano before his arrest the night of July 5. On cross-examination Marino claimed that in the police station he was punched in the stomach by the arresting officer and two other officers for five or ten minutes and was knocked out. He claimed he saw two or three other officers strike Ralph Polizzano in the stomach.

Not until this point in the trial did counsel for Ralph Polizzano move to exclude Gibbon's testimony of the oral admissions on the ground they were made under duress.

Counsel asked for a hearing and for a mistrial if the court should find for Ralph Polizzano on these questions.

The trial judge could have denied the motions on the ground that they were untimely made. As it was, he granted a hearing at which Polizzano testified. From the discrepancies in the testimony of Marino and Polizzano, Polizzano's failure to complain earlier, his plea of guilty to a state narcotics charge based on the same facts, and the police medical records, there was ample reason for the judge to deny the motions as he did. Nevertheless he charged the jury that they were to disregard the admissions if they found them to have been made for fear of bodily harm, and that, in any event, they were to be considered solely against Ralph Polizzano. We find no error in these rulings.

Aviles' Postarrest Statement Regarding Ralph Polizzano

Ralph Polizzano also complains of the admission in evidence, over his objection, of an unsigned statement of appellant Aviles made after the latter's arrest on June 3, 1958. In this statement Aviles referred to a meeting with "Ralph" at the Squeeze-Inn Bar, related that Ralph wanted him to buy stuff directly from him instead of the Spanish fellow who had introduced him and stated that the stuff he bought from Ralph was delivered by a man he called "Junior." When the judge overruled the objection to admission of the exhibit, Ralph Polizzano's counsel sought to have the name "Ralph" deleted or to have "a man" substituted, but this application was also denied. The judge

did instruct the jury three times immediately preceding and following admission of the statement that it was to be considered only against Aviles and repeated this admonition twice in instructing the jury. We find no error in the admission of the statement in evidence in view of the judge's careful and repeated instructions.

The government may introduce admissions of one defendant even though other defendants on trial are implicated, provided the jury is carefully and clearly instructed that the admission can be considered only against the declarant. *Delli Paoli* v. *United States*, 352 U. S. 232 (1957); *United States* v. *Bando*, 244 F. 2d 833, 838-9 (2 Cir.), *cert. denied* 355 U. S. 844 (1957). While it might have been the better practice under these circumstances to have deleted the name "Ralph" from the statement before admitting it in evidence, so as not to run the risk of unnecessarily focusing attention on Polizzano, we see no reason to presume that the jury disregarded the judge's repeated instructions as to the use to be made of the admissions.[4]

Barcellona's Right to Counsel

Appellant Barcellona complains that he was denied counsel in violation of his right under the Sixth Amendment which guarantees that "In all criminal prosecutions, the accused * * * shall enjoy the right to have the assistance of counsel for his defence," and under Rule 44, Federal Rules of Criminal Procedure. We think appellant was

[4] We do not overlook the fact that when the jury asked for the Aviles statement during its deliberations the trial judge directed the deletion of "Ralph" before sending the exhibit to the jury.

adequately represented. It is true that Barcellona was without counsel from the time he appeared in the district court on July 16, 1958 until November 25, 1958, when the court assigned Roy Reardon, Esq. to represent him. But the trial did not commence until January 5, 1959 and thus his counsel had six weeks in which to prepare. This was ample assistance of counsel in view of the fact that Barcellona does not advise us in what respect he was prejudiced by his lack of counsel prior to November 25, 1959. Furthermore, he was given the benefit of all motions made by other counsel during pre-trial. So far as appears, all was done that needed to be done and could be done on his behalf. While there is language in the cases that an accused is entitled to counsel "for any part of the pretrial proceedings" this is always coupled with the qualification that there is no error unless "he is so prejudiced [by the absence of counsel] as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'" *Crooker* v. *California*, 357 U. S. 433, 439 (1958).

Defendant Fiano's Courtroom Outburst

On March 11, when the government was adducing evidence as to defendant Fiano's birthday, Fiano burst into a tirade before the jury in which he asserted that all those on trial were convicts and that some were then serving time in prison. All defense counsel immediately moved for a mistrial. In the course of these motions counsel for Jean Capece asserted that this defendant had no criminal record, which led to further motions for a mistrial. The appellants

claim that the Fiano outburst was provoked by the government, but there is no warrant for this assertion. In the context of the questioning then in progress, Fiano's birthday was a relevant line of inquiry. Following the outburst, Judge Bicks promptly instructed the jury to disregard Fiano's statements, and also told the jury that they were not to assume from the remarks of Capece's counsel that any other defendants had a criminal record. Manifestly it was not error to deny the mistrial motions. If such conduct by a co-defendant on trial were held to require a retrial it might never be possible to conclude a trial involving more than one defendant; it would provide an easy device for defendants to provoke mistrials whenever they might choose to do so. Under all the circumstances the trial judge's instructions adequately dealt with the situation and his denial of the mistrial motions was proper. See, e.g. *United States* v. *Stromberg*, 268 F. 2d 256, 269 (2 Cir. 1959); *Reistroffer* v. *United States*, 258 F. 2d 379, 392-93 (8 Cir. 1958), *cert. denied* 358 U. S. 927 (1959).

Double Jeopardy Claims of Daniel and Nicholas Lessa and Joseph Di Palermo

Appellants Daniel and Nicholas Lessa claim that the trial court should have granted their motions for acquittal on the ground that they were twice placed in jeopardy because they had already been convicted for the same acts in *United States* v. *Stromberg*, 268 F. 2d 256 (2 Cir. 1959). In that case the evidence showed that the Lessas received their supply from Vellucci, through runners Ewing and Tedesco, until Vellucci was arrested in November 1955.

It was only after that that they turned to the defendant Orniento for their supply. Thus the Lessas, as dealers, simply purchased their narcotics supplies from two different and separate groups. The mere fact that several retailers purchase from separate suppliers at different times does not transform two separate conspiracies into one.

Analysis of the *Stromberg* record and comparison with the proof in this case shows that the two conspiracies were entirely different enterprises in all respects, their principals, the source of their drugs, the means and places of importation, their distribution points, and the centers from which they operated in Manhattan.

Joseph Di Palermo, also indicted in the *Stromberg* conspiracy, likewise claims double jeopardy. As he was not placed on trial in Stromberg since he was then a fugitive, he has obviously not twice been placed in jeopardy.[5]

The Simultaneous Trial of 17 Defendants

The complaint that the individual defendants could not receive sufficient individual consideration at a trial of 17 defendants is without basis in fact or law. The question of how many co-defendants should be tried at one trial is within the discretion of the trial court and there is no support for the claim that that discretion was abused here.

[5] The *Stromberg* proof showed that Joseph Di Palermo's only link with the conspiracy was Vellucci from whom he purchased heroin; he had no contacts with any of the principal *Stromberg* conspirators and he never had any contact with the Lessas so far as the proof in that case showed.

The rights of each defendant were scrupulously guarded by the trial judge throughout the trial. In the number of extra challenges allowed in the jury selection, the latitude of cross-examination, the one week allowed for defense summations, and the patience show in listening to numerous motions of the many counsel, the trial judge was eminently fair to the point of being overgenerous. Moreover, the court's charge to the jury fairly summarized the evidence, distinguished the case of each defendant and emphasized the requirement of separate consideration of the case as to each defendant. Under these circumstances, there can be no complaint of prejudice from such a joint trial. See *United States* v. *Stromberg*, 268 F. 2d 256, 265 (2 Cir. 1959); *United States* v. *Bruno*, 105 F. 2d 921 (2 Cir.), rev'd on other grounds, 308 U. S. 287 (1939).

Appellant Genovese complains he was so prejudiced by testimony that he was seen emerging from an automobile on January 17, 1956 at Kenmare and Mulberry Streets in Manhattan as to have necessitated the granting of a mistrial as to him. This testimony was given by Sherman Willse, a member of the staff of the Senate Select Committee on Improper Activities, who in January 1956 was a New York City police officer. This testimony was stricken by the court[6] with clear instructions to the jury to disregard it, although the government stated that it was prepared to show that the automobile was at the time registered in the name of appellant Vincent Gigante.

[6] In our opinion the court erred in excluding the evidence which corroborated Cantellop's testimony of the relationship between Genovese and Gigante as it tended to show that Genovese was driven around by Gigante and it was near enough in time to the events in question.

We cannot see how Genovese was improperly prejudiced by this testimony. We have read it over and conclude that it was utterly meaningless by itself and devoid of the sinister import which appellants seek to attach to it. In any event the striking of the testimony and the court's instruction to the jury cured any possible error in admitting it. Our jury system is founded on the assumption that the jury will adhere to the trial court's instructions to it. See *United States* v. *On Lee*, 193 F. 2d 306 (2 Cir. 1951), aff'd 343 U. S. 747 (1952). Under the circumstances here present, there is no reason to presume that the jury disregarded the court's instruction.

Appellant Jean Capece complains of the admission of testimony of a customs official that she flew to Cuba on November 20, 1956 with Joseph Di Palermo and Salvatore Benanti and upon her return two days later she had $9,000 in cash concealed in her brassiere. Coming after much evidence showing that Jean Capece worked with Joseph Di Palermo in the distribution of narcotics, that Benanti was a runner for Di Palermo, and that two months earlier, in September 1956, Montanez had advised Di Palermo that no narcotics would be available from Cuba for some time because of the revolution, this testimony was relevant to corroborate Cantellop's story. Moreover, Benanti's use of a false name and address and Jean Capece's three different versions of how she came to possess $9,000 in one hundred dollar bills would hardly support the theory that the two day trip by air was for a vacation. On the contrary, the trip was persuasive independent evidence corroborating Cantellop's testimony, as it was reasonable to conclude that

the three had gone to Cuba to purchase narcotics, although apparently with some lack of success.

We have dealt with the major claims of error advanced by the appellants. The other contentions have so little merit that they do not warrant any discussion. In our opinion Genovese's motions to inspect a statement taken by the United States Attorney from Customs Agent Benjamin Begendorf, for two reports of Narcotic Agent John Enright, and to take depositions of Begendorf and Enright were without the slightest foundation. Neither was called as a government witness and both were available to be called by the defense, who failed to call either. These motions seem to have had no purpose but to delay the trial. The trial judge exhibited commendable patience and courtesy in the face of such maneuvers.

On this appeal two of the defendants have been represented by assigned counsel, Roy L. Reardon for Charles Barcellona and Allen Stim for Ralph Polizzano. These counsel represented the same defendants at trial; in addition Martin Carmichael, Jr. represented Louis Fiano at trial. We commend them for their services so rendered and the high quality of their counsel.

With the exception of Rodriquez, the appellants have all been convicted after an eminently fair trial upon the convincing evidence of several accomplices which evidence was corroborated in important details.

We affirm the judgments of conviction of all appellants, except Benjamin Rodriquez and we reverse his conviction and direct that the indictment be dismissed as to him.